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No. 88-744

# In the Supreme Court of the United States

OCTOBER TERM, 1988

MARK TURNER, IV, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner's conviction for making a false statement to a Deputy United States Marshal, in violation of 18 U.S.C. 1001, is barred by the "exculpatory no" doctrine.

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 854 F.2d 1318 (Table).

## JURISDICTION

The judgment of the court of appeals was entered on August 4, 1988. A petition for rehearing was denied on September 2, 1988 (Pet. App. 5-6). The petition for a writ of certiorari was filed on November 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was con-

victed of making a false statement to a Deputy United States Marshal, in violation of 18 U.S.C. 1001.[1] Petitioner was sentenced to two years' imprisonment with all but 60 days suspended, and placed on three years' probation. As a special condition of probation, petitioner was fined $5,000. The court of appeals affirmed.

The evidence at trial showed that in July 1987 the United States Marshals Service was searching for Steven Haag. Following convictions on drug distribution and firearms counts, Haag had failed to surrender to begin serving his prison sentence. The marshals learned that Haag had been driving a car registered to petitioner's sister. After observing the car at petitioner's house, the marshals on July 28 asked petitioner for permission to search the house for Haag. Petitioner consented, but Haag was not found. During questioning, petitioner stated that he had not seen Haag since January, when in fact he had seen Haag more recently than that. Petitioner's false statement regarding Haag was the basis for his conviction. C.A. App. 17-25, 72-73, 76-79, 114-117, 121-123.

Petitioner and Haag were arrested in mid-August, while they were leaving a hotel together. In a post-arrest statement, petitioner admitted that he had lied to the marshals on July 28 regarding his knowledge of Haag's whereabouts. C.A. App. 121-123.

On appeal, petitioner argued for the first time that his false statement constituted an "exculpatory no" and therefore did not fall within the reach of the federal false statement statute. In its unpublished opinion, the court of appeals refused to address the issue because petitioner had not raised it in the district court. Pet. App. 3.

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[1] The jury acquitted petitioner of assisting a fugitive to avoid apprehension, in violation of 18 U.S.C. 3, and harboring a fugitive, in violation of 18 U.S.C. 1071.

## ARGUMENT

The court of appeals properly refused to consider petitioner's "exculpatory no" claim. In essence, petitioner's claim is one of insufficient evidence, as he argues that the government failed to prove that he made a false statement of the sort covered by Section 1001. But the settled rule is that, in the normal case, an appellate court need not review the sufficiency of the evidence if the defendant failed to move in the district court for a judgment of acquittal pointing out the alleged deficiency in the government's proof. *United States* v. *Jackson*, 824 F.2d 21, 26 (D.C. Cir. 1987), cert. denied, No. 87-5667 (Jan. 11, 1988); Fed. R. Crim. P. 29. See generally 2 C. Wright, *Federal Practice and Procedure: Criminal 2d* 672 (2d ed. 1982) (collecting cases). Petitioner is entitled to reversal only if a "particularly egregious" error occurred that caused a "miscarriage of justice." Fed. R. Crim. P. 52(b); *United States* v. *Young*, 470 U.S. 1, 15 (1985); 2 C. Wright, *supra*. In this case there was no such error, for petitioner's "exculpatory no" claim would not have provided a basis for vacating his conviction even if it had been raised in the district court.[2]

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[2] Contrary to petitioner's suggestion (Pet. 4), he should not be excused for his procedural default merely because the Fourth Circuit had not yet recognized the "exculpatory no" defense at the time of his trial. Cf. *United States* v. *Frady*, 456 U.S. 152, 167-169 (1982) (requiring a defendant who raises a claim for the first time on collateral attack to show "cause" excusing his procedural default). The Fourth Circuit had explicitly noted that the viability of the doctrine was an open question in the circuit (see *United States* v. *Cole*, 622 F.2d 98, 100 n.2, cert. denied, 449 U.S. 956 (1980)), and the doctrine had been recognized by other circuits since 1962 (see *Paternostro* v. *United States*, 311 F.2d 298 (5th Cir. 1962)), so petitioner had no good reason not to raise the defense. Indeed, one of petitioner's original co-defendants, David Weller, who eventually testified against petitioner

By its plain terms, Section 1001 broadly reaches "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations * * *." Section 1001 was designed to protect "the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described" in the statute. *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941). Its "sweeping language * * * covers all matters confided to the authority of an agency or department," including matters related to criminal investigations. *United States* v. *Rodgers*, 466 U.S. 475, 479 (1984).

The courts of appeals, however, have held that Section 1001 does not apply to cases involving simple denials of guilt by the target of an investigation to an officer cloaked with criminal investigative authority. See, *e.g.*, *Paternostro* v. *United States*, 311 F.2d 298, 300-301 (5th Cir. 1962) (creating the "exculpatory no" exception to Section 1001); *United States* v. *Medina de Perez*, 799 F.2d 540 (9th Cir. 1986); *United States* v. *Cogdell*, 844 F.2d 179 (4th Cir. 1988). Although the statute does not expressly provide for such an exception, the courts have reasoned that mere denials of guilt do not impair the basic functions of the agency to which the statement is made. *United States* v. *Medina de Perez*, 799 F.2d at 544; *United States* v. *Cogdell*, 844 F.2d at 183. Otherwise stated, an "exculpatory no" does not subvert the "valid legislative interest in protecting the integrity of official inquiries." *Bryson* v. *United States*, 396 U.S. 64, 70-71 (1969). The

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in exchange for dismissal of the charges against him, had relied on the "exculpatory no" doctrine in a motion seeking dismissal. See Motion to Dismiss Indictment (filed Sept. 25, 1987).

Department of Justice, as a matter of policy, has refused permission to prosecute cases involving mere denials of guilt. See *Nunley* v. *United States,* No. 77-5069, Memorandum for the United States (filed November 1977).[3]

The "exculpatory no" exception, as created by the courts and applied by the Department, is a narrow one. It is appropriately invoked, for example, where an FBI agent asks a suspected bank robber, "did you rob the bank," and the robber falsely replies, "no." Since suspects are normally expected to deny their guilt, such a denial rarely misleads an agent, and it does not significantly impair his task of investigating an offense. The courts of appeals have adopted a five-part test that distinguishes such harmless denials from false statements punishable under Section 1001. Following the Ninth Circuit's decision in *Medina de Perez,* the Fourth Circuit held in *Cogdell* that a false statement does not violate Section 1001 when (844 F.2d at 183):

> (1) it was not made in pursuit of a claim to a privilege or a claim against the government;
>
> (2) it was made in response to inquiries initiated by a federal agency or department;
>
> (3) it did not pervert the basic functions entrusted by law to the agency;
>
> (4) it was made in the context of an investigation rather than of a routine exercise of administrative responsibility;
>
> (5) it was made in a situation in which a truthful answer would have incriminated the declarant.

Petitioner's statement is not protected under that test because it fails the third and fifth elements of the test.

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[3] United States Attorneys are required to consult the Criminal Division of the Department of Justice prior to seeking an indictment charging the making of a false statement to a federal criminal investigator. *United States Attorneys Manual* § 9-2.133 (1984).

First, his false statement impaired the function of the United States Marshals Service. While a suspected bank robber would be expected to deny his guilt, and a law enforcement officer might automatically discount his denial, a statement that a person has not seen a fugitive is not inherently suspect, and hence may mislead a law enforcement officer. Here, it appears that petitioner's false statement that he had not seen Haag, which was made on July 28, 1987, significantly impaired the Marshals Service's investigation, since petitioner subsequently admitted that he knew Haag's whereabouts on that date but the fugitive was not captured for three weeks after petitioner lied to the marshals.

The second reason that petitioner's statement fails to qualify as an "exculpatory no" is that it was not "exculpatory," since it is not a crime to have seen a fugitive. Moreover, a person who directs law enforcement officers to a fugitive is unlikely to face charges for harboring or assisting the fugitive, even if the person's conduct might otherwise have subjected him to such charges. Petitioner states (Pet. 19 n.6 (emphasis added)) that he reasonably considered a truthful answer to be incriminating because the deputy marshal who asked him if he had seen Haag warned that he would be subject to prosecution "*if* he did not help them apprehend" Haag. Contrary to petitioner's argument, however, that warning states that a lie would be incriminating, but suggests that a truthful answer assisting in Haag's apprehension would *not* be incriminating. Accordingly, petitioner's false statement was not exculpatory.

The "exculpatory no" exception is therefore plainly inapplicable here, which may be why petitioner failed to raise it in the district court. Accordingly, the court of appeals was justified in refusing to consider the applicability of the exception.

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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